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CHARLES ELMORE C

No. 555.

OCTOBER TERM, 1929.

IN THE

Supreme Court of the United States

THE UNITED STATES OF AMERICA, Petitioner,

v.

ALFRED E. NORRIS.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT.

FREDERIC L. BALLARD,
1035 LAND TITLE BUILDING,
PHILADELPHIA, PA.,
Attorney for Respondent.

CHARLES I. THOMPSON,
ALLEN HUNTER WHITE,
1035 LAND TITLE BUILDING,
PHILADELPHIA, PA.,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929. No. 555.

The United States of America, Petitioner,

v.

Alfred E. Norris.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT.

SUMMARY OF ARGUMENT.

1. It is the clear intent of Congress that the purchaser of intoxicating liquor for beverage purposes should not be penalized. A conviction in this case for conspiracy to transport would frustrate that legislative intent because all Norris did was purchase.

2. There can be no conviction here for conspiracy to transport because the only transportation involved was the delivery of the liquor sold and was an essential element of the sale itself and not an ingredient in addition to it.

3. Norris' act of purchase was not a sufficient degree of cooperation to meet the requisite for concerted action necessary to make out a conspiracy.

ARGUMENT.

POINT 1:—A CONVICTION IN THE PRESENT CASE WILL DEFEAT THE LEGISLATIVE INTENT THAT THE PURCHASER OF INTOXICATING LIQUOR FOR BEVERAGE PURPOSES SHOULD NOT BE PENALIZED.

The respondent Norris bought whisky from a bootlegger. Kerper, the bootlegger, shipped the whisky to Norris by prepaid express, to fill Norris' orders for rye whisky which were given over the telephone, just as any commodity is purchased over the telephone. Norris paid for the whisky. That is the sum total of what he did. The Government contends that the simple act of purchase involved Norris in a conspiracy; that by virtue of it alone, and without the addition of any other act or agreement on his part, he and the bootlegger conspired to transport liquor in violation of the National Prohibition Act (of Oct.

28, 1919, sec. 3, title II, c. 85, 41 Stat. 305, 308). In the words of the Circuit Court of Appeals, "Such a situation is scarcely conceivable, and yet that is the position of the Government" (R. 15).

There were twelve separate purchases. The Government now suggests for the first time that the fact that there were twelve, rather than a single purchase, affects the question whether Norris was a conspirator. It is sufficient to say that the Gov rnment limited itself to, and asked the Circuit Court of Appeals to decide, the simple question, whether the purchaser in a single sale, by virtue of his purchase, conspires with the seller to transport, when delivery of the liquor sold is effected by transportation from the seller to the purchaser. That is the question which the Circuit Court decided and it is that question which is here for review.*

* The Circuit Court stated the question submitted by the Government and decided by it as follows (R. 13):—

> "Their clear purpose was, as frankly stated and repeated by the Government's counsel in their argument, to bring before the Court for decision the single question whether a buyer and a seller of liquors, where transportation and delivery is made in pursuance of the sale, can be together indicted for a conspiracy to transport."

The review here is confined to this question. The Government cannot now submit any different or broader question (*Great Northern Ry. Co.* v. *United States*, 208 U. S. 452, 470, 471). This matter is discussed more fully under Point 3 at page 29 ff of this brief, where we deal with the degree of co-operation requisite to a conspiracy.

The Government states that this case actually does not involve the question whether the purchase of liquor is an offense (Brief, p. 12). But, plainly it does. It involves the question whether such purchase is the offense of conspiracy to transport.

As this question turns solely upon Federal statutes, it is to be answered by finding the legislative intent. To this end, it is important to examine the legal background furnished by earlier regulatory and prohibitory statutes and the cases construing them.

When Federal prohibition was adopted most of our population lived under laws which had always recognized the manufacture, sale and use of intoxicating liquor as lawful. Into that field, we boldly entered with legislation which was not only prohibitory but penal. The step was drastic but it was not hasty and ill-considered. All recognized that this tremendous change could not be made over night.

There was an abundant experience on which to draw. For many years there had been state laws licensing sales and Sunday and election-day prohibitory laws. Local option was tried as early as 1832. The first state or territorial prohibitory law was enacted in 1843. There were also many Federal statutes dealing with liquor prohibition in territorial, war and Indian legislation, going back as far as 1802. Under all of these different kinds of enactments, which forbade or regulated the sale of liquor, the question had often arisen as to whether the purchaser com-

mitted *any* offense by virtue of his purchase. It was uniformly held that he did not,* in the absence of an express and unequivocal statutory penalty for purchasing.

The cases which have involved the status of the purchaser have approached the question from many angles, *e. g.*, whether the purchaser was an accomplice or principal, or whether he aided, abetted, solicited, induced, incited, counseled, encouraged, caused, hired, or commanded the sale. The answer was always the same, even though the statutes penal-

* There were many such cases. A sufficient number of them are cited in *Lott* v. *United States*, 205 Fed. 28 (9th C. C. A. 1913), from which we later quote. There was only one case contra: *State* v. *Bonner*, 2 Head 135 (Tenn. 1858), which involved a sale by a slave and was later overruled: *Harney* v. *State*, 8 Lea 113 (Tenn. 1881). The only case before 1919 involving a statute expressly penalizing the purchase which we have found is *Walt* v. *People*, 46 Colo. 136, 144 (1909); that case was not, however, one in which a purchaser was punished. The Nebraska prohibition law of 1917 expressly penalized "purchase." Comp. Stat. Neb., 1922, Sec. 3238. We have not seen any other statutes prior to 1919 which fixed the purchase with a penalty, although there might have been some. Black on Intoxicating Liquors, p. 443 (1892), and 2 Woollen and Thornton on Intoxicating Liquors, p. 1220 (1910), suggest that there might be such statutes, although they cite none. Since the Eighteenth Amendment, Texas, at least, has expressly penalized the purchase: *Robert* v. *State*, 88 Tex. Cr. 488, 228 S. W. 230 (1921). So far as we have found, no federal liquor law prohibited the purchase. This Court has said, by way of dictum, that a state could, under its police power, constitutionally prohibit the purchase of liquor: *Crane* v. *Campbell*, 245 U. S. 304, 307; *Samuels* v. *McCurdy*, 267 U. S. 188, 194; we have seen no case in this Court where such a statute was involved.

ized the specific acts of aiding, abetting, etc., just enumerated. In short, the uniform holding was that the purchaser committed *no* crime at all, and there was uniform legislative acquiescence in such construction. The undoubted legislative policy thus shown was to penalize the sale but not the purchase. That was true whether the cases were on indictments charging the purchaser with an alleged crime, or where the question was whether the purchaser had committed a crime and so would incriminate himself if he gave testimony against the seller. The scope of such latter cases is all-inclusive because if the proposed witness (the purchaser) had committed *any* crime in connection with the purchase, his testimony would incriminate him.

Com. v. *Willard,* 22 Pick. 476 (Mass. 1839), is an early and leading case of this latter kind and has always been followed. The defendant Willard had been committed for contempt for refusing to testify to an unlicensed sale. Chief Justice Shaw said, at p. 477:—

> "But the Court are of opinion, that the witness would not be liable to *any* prosecution as such purchaser, and therefore would not criminate himself or expose himself to punishment by such a purchase. No precedent and no authority has been shown for such a prosecution, and no such prosecution has been attempted within the knowledge of the Court, although a similar law has been in force almost from the foundation of the government, and thousands of prosecutions and

convictions of sellers have been had under it, most of which have been sustained by the testimony of buyers. *That such a prosecution is unprecedented, shows very strongly what has been understood to be the law upon this subject.*"

And he added, at p. 479:—

"The Statute imposes a penalty, upon any person who shall sell. But every sale implies a purchaser; there must be a purchaser as well as a seller, and this must have been known and understood by the legislature. Now, if it were intended that the purchaser should be subject to *any* penalty, it is to be presumed, that it would have been declared in the statute, either by imposing a penalty on the buyer in terms, or by extending the penal consequences of the prohibited act, to all persons aiding, counselling or encouraging the principal offender. There being no such provision in the statute, there is a strong implication, that none such was intended by the legislature." (Italics ours.)

That Court concluded that the purchaser committed no offense at all.

A full discussion of the entire subject is contained in *Lott* v. *United States,* 205 Fed. 28 (9th C. C. A. 1913), where the purchaser, an Indian, was indicted for soliciting and inciting the seller to commit the Federal crime of furnishing liquor to an Indian who was none other than the purchaser Lott, himself. The Circuit Court of Appeals reversed a conviction, with instructions to dismiss the complaint. The Court said:—

"What was the intention of Congress in enacting the law? Was it intended to make unlawful the act of purchasing intoxicating liquor? If the answer is in the negative, it follows that an Indian who attempts to purchase intoxicating liquor, or solicits another to sell it to him, is guilty of *no* offense." (P. 31.)

"Congress must have been aware of the universal ruling of the courts that under laws prohibiting the sale of intoxicating liquors the purchaser committed *no* offense. We are not justified in assuming that, in so amending the law and increasing the punishment for its violation, it was the intention to make criminal, and subject to punishment as a crime, the act of purchasing or attempting to purchase intoxicating liquors, which theretofore had been innocent acts. *If such had been the intention of Congress, it is but reasonable to presume that it would have been expressed in such clear terms as to admit of no doubt.* In the absence of such express legislation, we are authorized to presume that Congress deemed it of greater advantage to the government in enforcing the law to leave the Indian who might succeed in purchasing liquor in Alaska free to testify in the courts against the seller thereof, than to punish the Indian for purchasing, or offering to purchase, the same."* (P. 31-2.) (Italics ours.)

* In the *Lott* case, the indictment was under a pre-existing statute which adopted for Alaska the common law of crimes, including the rule that soliciting a crime is itself a crime. The significance of the decision is that such earlier general enactment must be construed and applied in the light of the legislative intent manifest in the later specific statute creating the substantive crime involved.

These are but examples of the old and universal line of cases which had consistently held that under all such liquor legislation, a purchaser had not been made a criminal. That was the chapter of legal history which was before Congress when it embarked upon the project of national prohibition.*

That project was not decided upon without due deliberation. The first proposal for a prohibition amendment to the Federal Constitution was made in Congress in 1876. From then until the Eighteenth Amendment was adopted, at least 57 such proposals were made in Congress.†

To decide upon a governmental policy is relatively easy compared to the task of determining upon a practical plan for carrying the policy into effect. For example, it is a simple matter to decide that taxes must be collected; but to determine just how, and upon what or whom, the tax should be levied calls for statesmanship of the highest order. So it

* It is to be presumed that Congress had knowledge of the prior laws. *United States* v. *Turner*, 266 Fed. 248, 250 (D. C. Va. 1920). We also know from Mr. Volstead that Congress had actual knowledge thereof. In speaking of the origin of the Prohibition Act, he said: "No one should draw a bill of this kind without making use of legislation that has been tried out in other jurisdictions. Anyone who would attempt to originate a bill without doing that would be exceedingly foolish." Vol. 58 Cong. Rec. part 3, p. 2512.

† Ames, Amendments to the Constitution, Ann. Rept. Am. Hist. Assn., 1896, Vol. II, pp. 272-3; Musmanno, Proposed Amendments to the Constitution, House Doc. 551, 70th Cong., 2d sess., pp. 230-1.

was with prohibition. To decide that there should be national prohibition was but the beginning and the easier part of the matter. How prohibition in law should be attempted to be made prohibition in fact was a question most difficult to decide. Just what steps of the traffic should be proscribed was a most important and delicate matter. The possible social consequences had to be weighed. These were questions which were peculiarly within the province of the legislature.

The successive steps of manufacture, transportation, sale, purchase and use were separately considered in the deliberations over the scope of the Eighteenth Amendment. It was determined that the best way to stop the traffic was at its source; and this for two reasons: (1) because it was the practical means of achieving the desired physical result; and (2) because to make the purchase of liquor a crime would have made half our population criminals over night.

It is not to be supposed that the plan initially adopted by Congress will necessarily be the final one. It was very important that the practical plan first tested should be one which would not immediately involve millions of citizens in crime. The late Chief Justice Taft fully recognized all this, as is shown in his letter to Mr. Fisher: "The habits of an important section of a congested part of the country cannot be changed overnight or in years. The reform

and the adaptation of society to that at which the amendment aims must be gradual." The United States Daily, Mar. 20, 1930, p. 3, col. 4.

At one time in the deliberation over the Eighteenth Amendment, it was expressly proposed to include the prohibition of "purchase" along with that of "manufacture, sale or transportation." That proposal was overwhelmingly rejected in the Senate by a vote of 4 to 62.*

* The proposal to prohibit "purchase" included "use." Both were alike rejected. The debates in the Senate are in Vol. 55, Cong. Rec., part 6, pp. 5548-5560, 5585-5627, 5636-5666. In support of the above proposal, it was argued (p. 5645): "It is hard for me to see why, if the manufacture and sale are to be forbidden, the purchase ought not also to come under the ban of the law. It is impossible for me to understand why, if it is to be unlawful to manufacture and to sell it, to buy it and transport it, to import it or export it, it ought not also to be unlawful to use it. Now, if we are going to perform this task thoroughly, if we are going to work it out completely, let us go the whole length while we are at it; let us prohibit not only the exportation, importation, transportation, and sale, but the purchase as well, and if all those things are to be forbidden, let us forbid its use as well. That is complete prohibition, practical prohibition, and it seems to me those who are so anxious to give the people real prohibition ought to be willing to vote for the amendment; that is, if they are really for real prohibition." It was questioned whether it would not "be more difficult to secure a conviction or to secure evidence of an illegal sale if the purchase of it also were made illegal, because the witness, who, as a rule, is the purchaser, would be protected from answering on the ground that the answer might incriminate himself." It was answered that other evidence could be obtained and that purchasers could be given immunity if they testified.

The debates in the House are in Vol. 56, Cong. Rec., part 1, pp. 422-470. A minority report of the House Judiciary Com-

Just as "purchase" was intentionally omitted from the Eighteenth Amendment, so was it likewise intentionally omitted from the prohibitions of the Volstead Act.* It is also to be noted that Sec. 3 of the Act prohibits and penalizes "delivery" but not "receipt." The report of the House Judiciary Committee expressly stated that Title II of the Act "has in it no new or experimental features. Every provision in it has precedents in state or Federal legislation."† We have seen that all such precedents consistently had provided no prohibition or penalty for a purchaser. Unquestionably there is manifest

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mittee, opposing the Amendment as phrased, pointed out that "all questions concerning the use of intoxicating liquor for beverage purposes depend upon the buyer and the seller, or, to speak more properly, upon the consumer and the seller." H. R. Rept. No. 1493, 64th Cong. 2d sess., part 2 (Cong. Doc. 7110). However, no change which is pertinent here was made by the House in the form of the Senate Resolution for the Eighteenth Amendment.

* In discussing appropriate language for the latter part of Sec. 3, Title II, which deals with non-beverage and sacramental liquors, Mr. Volstead pointed out, "There is no prohibition expressly against purchase in the first part of the section" (Vol. 58, Cong. Rec. part 3, page 2802). The first part of the section to which Mr. Volstead referred deals with prohibition for beverage purposes.

† H. R. Rept. 91, 66th Cong. 1st sess. (Cong. Doc. 7592), p. 7; it is also printed in Vol. 58 Cong. Rec. part 3, pp. 2294-6. The above quotation is also quoted in *United States* v. *Katz*, 271 U. S. 354, 360. The prohibition of "use" was in the House Bill but was taken out and is not in the Act. The committee said that "possess" was left in the Act because possession outside of a residence would be illegal: Sen. Rept. 151, 66th Cong. 1st sess.

a definite and well considered intent in Congress in passing the Volstead Act not as yet to lay a hand upon the purchaser.

This manifest legislative intent not to touch the purchaser was immediately recognized by the Federal Courts which have unanimously said that, under the Act, it is not a crime to purchase although the sale has been penalized. Typical statements are:—

"It is a crime to sell, but not a crime to purchase."*

"Buying is not a crime."†

"The statute is directed against the seller, not the purchaser."‡

Congress has been in session repeatedly since this interpretation of the Act has been reiterated by the Courts, and Congress has not amended the Act so as to make purchase a crime. Thus we have a definite

(Cong. Doc. 7590), p. 14. The debates on the Act are found in Vol. 58, Cong. Rec., parts 3-8, pp. 2280-2303, 2308, 2426-2443, 2445-2486, 2494-2513, 2552-2573, 2775-2808, 2856-2905, 2949-2977, 3004-3006 (House); 3920, 4789, 4833, 4836-4852, 4888, 4892-4896, 4903-4909 (Senate); 5080, 5081 (House); 5149 (Senate.) The conference report is in H. R. Rept. 360, 66th Cong. 1st sess. (Cong. Doc. 7593) and Sen. Doc. No. 118, 66th Cong. 1st sess. (Cong. Doc. 7610); it is printed in 58 Cong. Rec. 6431-3; debates and proceedings thereunder are in 58 Cong. Rec. pp. 6532, 6549-6552, 6681-6698, 6924, 6955, 7015, 7607-7611, 7621-7625, 7626-7634.

* *Singer* v. *U. S.*, 278 Fed. 415, 419 (3d C. C. A. 1922), *certiorari* denied, 258 U. S. 620 (1922).

† *Vannata* v. *U. S.*, 289 Fed. 424, 428 (2d C. C. A. 1923).

‡ *Dickerson* v. *U. S.*, 18 Fed. (2d) 887, 894 (8th C. C. A. 1927).

legislative intent, a judicial interpretation consistent with that intent and clear legislative acceptance of that interpretation. Therefore, we say that Congress had not, and has not, intended to make purchase a crime.*

A conviction in this case will defeat that legislative intent. The attempted use of the Conspiracy Act to such an end has repeatedly been condemned. The late Circuit Judge Hough of the second circuit spoke of such practice as "an indirection—an underhand way of doing something the Legislature never thought of" and as "a great stretch on the part of the prosecutor of the *quasi* judicial power lodged in him." This was said in *Vannata* v. *United States,* 289 Fed. 424, 428-9 (2d C. C. A. 1923), where, to increase the penalty, an indictment for conspiracy was secured against the *seller* and admittedly well laid.

Former Assistant Attorney General Willebrandt

* Congress has been alive to the enforcement of the Act and the decisions under it. Even in the debates on the Act itself, before its enactment, it was recognized that "this is not the last act of legislation upon the subject of prohibition in the United States. This law will have to be amended in the future, and for years to come perhaps every session of the Congress will have to deal with laws enforcing the eighteenth amendment." Vol. 58 Cong. Rec. part 3, p. 2286. For example, there was a conflict among the district courts as to whether the Prohibition Act repealed the old revenue laws. This Court then held that it had. *United States* v. *Yuginovich,* 256 U. S. 450. Congress then passed the Supplementary Act of Nov. 23, 1921, 42 Stat. 222, providing that the old revenue laws remain in force, and they are now enforced. *United States* v. *Stafoff, 260* U. S. 477. Although the decision in the case at bar has been much discussed in Congress, the law has not been amended.

testified before the House Judiciary Committee, at hearings on the Jones Bill (Increased Penalties Act of Mar. 2, 1929, 45 Stat. 1446), that "as a result of the inadequacy of the penalty which the Volstead Act provides for the things the Constitution prohibits, prosecutors have been led to resort to prosecutions under other laws than the Volstead Act whenever they could * * *. In my estimation, Section 37 (Conspiracy Act) has been strained beyond all reach in grounding liquor-law prosecutions under it."

The committee, in reporting favorably on the Jones Bill, said that it would not operate harshly but would "merely provide an adequate penalty without the necessity of making a strained resort to laws other than those for the enforcement of the prohibition." Sen. Rept. 768, 70th Cong. 1st sess. (Cong. Doc. 8830).

The Conference of Senior Circuit Judges has also protested against misuse of the Conspiracy Act. Rep. Atty. Gen. for 1925, 5-6; Frankfurter and Landis, The Business of the Supreme Court, 250-1.

Regardless of this aspect of the conspiracy charge, it is bound to fail; under established principles of law, it cannot succeed. This brings us to Point 2 of our argument.

POINT 2:—INASMUCH AS THE ONLY TRANSPORTATION HERE INVOLVED WAS THE DELIVERY OF THE LIQUOR SOLD AND THUS AN ESSENTIAL ELEMENT OF THE SALE, AN INDICTMENT OF THE PURCHASER AS A CONSPIRATOR TO SUCH ELEMENT OF THE SALE WILL NOT LIE.

The first attempt at such a use of the Conspiracy Act to come before this Court was *United States* v.

Katz, 271 U. S. 354, where the buyer and seller were indicted for the conspiracy to sell without making a permanent record of the sale, in violation of Sec. 10, Title II, of the Prohibition Act. There was only one buyer and one seller and the sale was a bootleg transaction. This Court held that Sec. 10 did not apply to bootleg sales; consequently a bootlegger and his purchaser could not conspire to violate it. The *Katz* case was nothing more than an attempt to fasten a purchaser with a crime. It failed.

Mr. Justice Stone also pointed out the embarrassment which would follow if the buyer and seller were indicted for conspiracy to make a mere sale. Suffice to say that no prosecuting officer has had the hardihood to attempt it.

After ten years of prohibition enforcement a new attempt to reach the purchaser is now made, viz., an indictment for conspiring with the bootlegger to transport. The Government cannot point to any case, decided at any time, in which a defendant has been held guilty of conspiring with the seller at the transportation of any goods, the sale of which was illegal, when all such defendant did was purchase the goods delivered. Nevertheless, that is attempted here. The question is squarely raised for a decisive opinion by this Court. It has been before two other circuit courts and passed on in the same way as the circuit court in the case at bar decided it.

The question first arose in *Becher* v. *United States*,

5 F. (2d) 45 (2d C. C. A. 1924), a case of conspiracy, including conspiracy to transport. There had been a comprehensive plan involving the importation of liquor, its storage in bonded warehouses, and its withdrawal on forged permits and the procuring of bonds of indemnity against liability for import duties. One Birnbaum was admittedly in some way involved. He contended that he was merely a buyer of some of the imported liquor and that as nothing was proved against him except that *the liquor had been delivered to him* and found in his cellar, there was no proof that he was a conspirator. Judge Learned Hand, speaking for a unanimous court, said at page 50:—

> "We concede at once that merely as *buyer* he was not a party to the scheme in *any* criminal sense, that on the contrary the prosecution was bound to involve him *in the plan as a whole in some other sense.*" (Italics ours.)

Although some of the packages of this particular imported liquor were found in his cellar, with the mark obliterated,

> "Still all this was indeed equally consistent with his being a large buyer and did not show his complicity."

Thus we see that the Circuit Court for the Second Circuit expressly rejected the doctrine which the Government advances here. Had that Court agreed with such doctrine it would have simply said that even if the facts were as Birnbaum contended, the result

would nevertheless be that he had committed the crime of conspiring to illegally transport because the liquor he had bought had been delivered to him in fulfillment of his purchase. On the contrary, the Court was at pains to go much further and show, through proofs of other acts (not of interest to us here because nothing of the sort is involved in the instant case), that Birnbaum was in complicity with the others and had himself acted in other ways in furtherance of the crimes which they all had conspired to commit.

The question next arose in *La Rosa* v. *United States*, 15 F. (2d) 479 (4th C. C. A. 1926). La Rosa was indicted, with others, for conspiracy, including conspiracy to transport. The only understanding La Rosa had with the others was that he would buy certain whisky from them and show them how to get it to his garage. He met them in his car outside the city where his garage was located, they being in their car with the whisky, and he piloted them, driving his own car, they following in theirs, to his garage where they left the whisky. Circuit Judge Rose, speaking for a unanimous Court, said that La Rosa had aided and abetted the transportation; but he added, at p. 481:—

> "We shall not go into the nice inquiry as to whether such an understanding would or would not suffice to sustain a charge that he [La Rosa] had entered into a conspiracy with them for the unlawful transportation of the liquor. If it

> does, seemingly anyone who agrees to buy liquor from a bootlegger, and tells him how to get it to his back door with it, commits an offense punishable by imprisonment in the penitentiary for as much as two years and by a fine of $10,000."

Judgment of conviction for conspiracy was reversed. The Court unequivocally rejected the precise contention which the Government now renews in this Court. Yet the *La Rosa* case presented a stronger case for the Government than does the case at bar, because La Rosa did much more than Norris did. The Court said that La Rosa aided and abetted the transportation but even that was not sufficient to cause it to consider the question of the conspiracy to transport. The question in this case was squarely raised in the *La Rosa* case, both under the indictment and on the facts proved, so the refusal of that Court "to go into the nice inquiry" is a clear holding that the Government's position was too tenuous to merit the serious consideration of that Court.

In both the *Becher* and *La Rosa* cases, the liquor purchased was in such large quantities that, as Circuit Judge Rose said in the *La Rosa* case, p. 481:—

> "From the quantity and character of the intoxicants found, it might be assumed that La Rosa expected to sell the larger part of them."

The *Becher* and *La Rosa* cases were, therefore, much stronger cases than this case against Norris who pur-

chased "for his own consumption or that of his guests; and he was in no sense a dealer of liquor." (Stipulation of Facts, R. 4.)

Of course, as purchaser, Norris expected the liquor to be delivered to him. Sale by the seller necessarily involves purchase by the buyer; and there is no sale until there is delivery. Delivery of the goods sold is an essential element of the sale. Sometimes the delivery is symbolic but there is none the less a delivery. Usually there is a transportation-delivery; and where the transportation is simply that which effects the delivery, such transportation is an essential element of the sale.

Here there was only one seller and one purchaser; the transportation was simply that which effected delivery. The agreement of both parties was requisite to the sale which necessarily includes its essential elements. Therefore an indictment of the buyer and seller for conspiring to an essential ingredient in that transaction will not lie. The classic examples are cases of bigamy, dueling and adultery. Since the commission of these crimes requires concert of two persons to effect the substantive offense, neither one can be guilty of the crime of conspiring to commit the substantive offense, by virtue of such requisite concert alone. *Shannon* v. *Com.,* 14 Pa. 226 (1850, per Gibson, *C. J.*). This is the rule in the Federal Courts. See *U. S.* v. *Dietrich,* 126 Fed. 664 (Cir. Ct. Neb. 1904) where Circuit Judge Van Devanter, now a jus-

tice of this Court, applied the rule to a case of bribery, where the substantive offense was punishable under a separate Act of Congress, and the attempt was made, unsuccessfully, to punish under the same Conspiracy Act as that involved in this case. Judge Van Devanter said:—

> "The gravamen of the charge is that the defendants conspired—united in purpose and agreed together—to commit an offense against the United States."

He quoted from Wharton's Criminal Law:—

> "When to the idea of an offense plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a character that it is aggravated by a plurality of agents, cannot be maintained. As crimes to which concert is necessary (*i. e.*, which cannot take place without concert), we may mention dueling, bigamy, incest, and adultery, to the last of which the limitation here expressed has been specifically applied by authoritative American courts. We have here the well-known distinction between *concursus necessarius* and *concursus facultativus*—in the latter of which the accession of a second agent to the offense is an element added to its conception; in the former of which the participation of two agents is essential to its conception; and from this it follows that conspiracy, the gist of which is combination, added to crime, does not lie for *concursus necessarius*. In other words, when

> the law says 'a combination between two persons to effect a particular end shall be called, if the end be effected, by a certain name,' it is *not lawful for the prosecution to call it by some other name;* and when the law says such an offense—*e. g.,* adultery—'shall have a certain punishment,' *it is not lawful for the prosecution to evade this limitation* by indicting the offense as conspiracy." (Italics ours.)

The Government points to certain language in *United States* v. *Katz,* 271 U. S. 354, 355, which, it says (Brief, 14), "tends to support" the conspiracy charge. Mr. Justice Stone, speaking for this Court, pointed out, at p. 355, that the overt act charged was the sale of whisky by one defendant to the other, which is an offense under the National Prohibition Act; but that as the defendants

> "were only one buyer and one seller, and as the agreement of the parties was an essential element in the sale, an indictment of the buyer and seller for a conspiracy to make the sale would have been of doubtful validity."

He went on to point out that:—

> "This embarrassment could be avoided in an indictment for a criminal conspiracy *only* if the buyer and seller were charged with conspiring to commit a substantive offense having an ingredient *in addition* to the sale, *not requiring*

the agreement of two persons for its completion." (Italics ours.)

It is obvious that the transportation which does no more than effect the delivery of the goods sold, and which is, therefore, an essential ingredient of the sale, is not what Mr. Justice Stone, in the *Katz* case, called "an ingredient in addition to the sale, not requiring the agreement of two persons for its completion." The only transportation involved in the present case is such delivery-transportation and nothing more.

The "embarrassment" mentioned by Mr. Justice Stone cannot be avoided in this case. Judge Kirkpatrick in the District Court and the Government here attempt to avoid it by pointing to the two hypothetical cases supposed by that judge (R. 7): (*a*) The itinerant bootlegger; and (*b*) the sale of premises containing liquor, followed by the seller moving out and the buyer moving in. They conclude that transportation is not necessarily involved in every sale. It is to be remembered, however, that delivery is necessarily involved in every sale, even including those two hypothetical cases. And where the transportation is no more than delivery-transportation which effects and completes an essential ingredient of the sale itself, and is not in addition thereto, the fact that transportation is made a distinct substantive offense by the National Prohibition Act is beside the point. Their argument overcomes but

one of the two obstacles pointed out by Mr. Justice Stone in the *Katz* case but does not meet his requirement that the subject of the conspiracy indictment must be *in addition* to the sale.

The Government argues that actual delivery to the purchaser of the article sold is not essential to a completion of the sale. It admits that "there is an obligation to deliver under a sale" but asserts that "no formal ceremony is necessary, nor is manual delivery required" (Brief, 16). The cases of *Glasgow* v. *Nicholson,* 25 Mo. 29, *Davis* v. *Alpha Portland Cement Co.,* 134 Fed. 274, and *Patrick* v. *Meserve,* 18 N. H. 300, are cited in support. In all of them, the Courts were simply dealing with the respective contractual obligations of buyer and seller with respect to the means of effecting delivery according to the particular contracts which they had made. In all of them the duty of the seller to deliver the goods sold was recognized. The Government now admits such a duty although it did not in its brief sur petition for the writ. The question often arises as to when the title of goods contracted to be sold passes to the buyer, and that may be at a time which is different from the time of the delivery of the goods. Such questions are entirely immaterial for our purposes although they may be very important in cases of fire, bankruptcy, levy of execution and the like. The fact remains that in all cases of sales there must always be a delivery. Where that delivery is effected by a transportation, the latter

is an essential ingredient of the sale itself. It is not a thing *in addition* thereto.

We are, of course, fully conscious that there may be and is much transportation of liquor which is not a necessary incident to a sale and at which two or more people, including a buyer, upon a showing of the necessary degree of cooperation and concert, could be held as conspirators under the Conspiracy Act. Where such are the facts involved in any such case, then it is very pertinent there that the Prohibition Act makes transportation a distinct substantive offense. Our point is that where the only transportation involved is such transportation as is the normal and necessary incident to the completion of a sale and purchase, the purchaser can no more be held for conspiracy at such delivery-transportation than for conspiring at the sale itself.

The Government need not argue (Brief, p. 13-14) the cases of *Cunard Steamship Co.* v. *Mellon,* 262 U. S. 100, *Grogan* v. *Walker & Sons,* 259 U. S. 80, and *Corneli* v. *Moore,* 257 U. S. 491, as holding that such transportation as there was in this case was in violation of that Act. We admit it. The Circuit Court of Appeals so said (R. 15). The seller was guilty not only of an illegal sale but also of an illegal transportation; and Kerper (the seller) has been convicted and paid his penalty for it. Thus the doctrine of the *Cunard* and similar cases has had full recognition and application in this very transaction.

POINT 3:—BY HIS MERE ACT OF PURCHASE, NORRIS DID NOT CONTRIBUTE THAT DEGREE OF COOPERATION NECESSARY TO MAKE OUT A CONSPIRACY.

A conspiracy is "a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose." *Pettibone* v. *United States*, 148 U. S. 197, 203. It is obvious, therefore, that before one charged with conspiracy can be found guilty of that crime, he must be shown to have contributed, in the required degree, to the concerted action. The respondent Norris did not. The sum and substance of his contribution was that which is involved in the mere act of purchase; that which is afforded by every purchaser; and no more. So that even if the delivery-transportation be regarded as not an essential element of the sale itself (which it is), there is still no basis for the charge of conspiracy.

It will not be disputed that there may be a degree of cooperation which is insufficient to meet the requirements of conspiracy. In *United States* v. *Holte*, 236 U. S. 140, 144, Mr. Justice Holmes had occasion to discuss the degree of cooperation requisite to the crime of conspiracy and in the course of his discussion, seeking for an example of cooperation which all would recognize as obviously insufficient, he said

> "there may be a degree of cooperation that would not amount to a crime, as where it was held that a purchase of spirituous liquor from an unlicensed vendor was not a crime in the pur-

chaser, although it was in the seller. *Com.* v. *Willard,* 22 Pick. 476."

We have already pointed out the uniform holding that the purchaser of liquor does not aid, abet, solicit, induce, etc., the sale and is not in any way criminally liable for his purchase, even though the specific acts of aiding, abetting, etc., have been expressly penalized by the prohibitory statutes (pp. 4-9 above).

An illuminating discussion of the degree of cooperation inherent in the purchase is found in *State* v. *Teahan,* 50 Conn. 92, 101:—

"It is insisted however that the statute * * * which provides that 'every person who shall assist, abet, counsel, cause, hire, or command another to commit any offense, may be prosecuted and punished as if he were the principal offender,' governs this case; it being contended that the person who purchases the liquor, induces the seller to commit the crime of selling it, and so aids and abets him in the commission of the offense * * *.

"The abbettor, within the meaning of the statute, must stand in the same relation to the crime as the criminal,—approach it from the same direction, touch it at the same point. This is not the case with the purchaser of liquor. His approach to the crime is from the other side; he touches it at wholly another point * * *. The purchaser of liquor, by his offer to buy, induces the seller of the liquor to make the sale; but he cannot be said to 'assist' him in it."

Obviously, if Norris conspired, he was a "principal offender" to the conspiracy and "stood in the same relation" to it as Kerper did. And yet the *Teahan* case (like all the other cases) has clearly said that the purchaser does no such thing. As early as 1839 Chief Justice Shaw said, in the *Willard* case, that although there had been thousands of prosecutions and convictions of sellers, there had not been any prosecution of any purchaser for any kind of offense.

The *Becher* and *La Rosa* cases, the instant case, and the principle quoted above from the *Holte* case, had back of them this long and uniform line of cases holding that the part played by the purchaser in an unlawful sale of liquor does not render him in any way criminally liable. The instant case, therefore, could not have been properly decided in any other way.

The cases dealing with "entrapment" by Federal agents also confirm the decision of the Court below with respect to the degree of cooperation necessary to constitute one a conspirator. A defendant will not be convicted where Government agents have induced him to commit the crime or conspired with him for its commission. To get evidence, Government agents customarily make purchases of the prohibited goods, *e. g.*, drugs or liquors, from suspected unlawful vendors. In such cases, the defense that the Government agents by so doing entrapped, induced or conspired with the defendant in such a way and to such an extent as to give him the benefit of the entrapment

rule, has been uniformly held not a good defense where the agents merely purchased goods delivered to them, for the reason that the mere purchase is not such an entrapment, inducing or conspiracy. See, for example, *Lucadamo* v. *United States,* 280 Fed. 653 (2d C. C. A. 1922); *Rossi* v. *United States,* 293 Fed. 896 (8th C. C. A. 1923), and *DeLong* v. *United States,* 4 F. (2d) 244 (8th C. C. A. 1925).

The *Rossi* case was one of criminal contempt for violating an injunction against the transportation of liquor as well as against its sale; the court held that the conduct of one who "called up the defendant on a phone and ordered the delivery of 'six,' " falls "far short" of such inducing or soliciting of the delivery as amounts to entrapment. A *fortiori,* such conduct falls far short of the requirements of conspiracy.

All the pertinent cases, of which those cited by us are leading examples, clearly show that Norris did not furnish such degree of cooperation as is an essential prerequisite to a conviction for a criminal conspiracy. In doing no more than ordering the whisky and paying for it he did nothing which made him a felon.

The Government apparently recognizes this inescapable conclusion since it professes to find the prerequisite degree of cooperation* from the fact that

* The Government's Brief, pp.1-2, erroneously states in the "Question Presented" that Norris' telephone orders to the bootlegger were "to ship him" the liquor. The Stipulation (R. 4-5) which was of ultimate facts and not evidence, and

there were twelve purchases, rather than a single one (Brief, 19). It would be a sufficient answer to point out that the stipulation of Facts (R. 4-5) affords no basis for such a contention. It shows no connection whatever between the separate purchases. Each is an isolated transaction, in itself insufficient. Clearly, a repetition of non-criminal acts does not constitute a crime.

Any discussion of this point is idle because the Government is foreclosed to make it; and the point was eliminated at the instance of the Government itself. No such contention was made in either the district or circuit courts. Indeed, at the argument in the Circuit Court, counsel for the Government "frankly stated and repeated" "their clear purpose" to limit the question of conspiracy to one of a single sale (R. 13). The Circuit Court so understood, as plainly appears from the first half of its opinion (R. 12-14). That was undoubtedly the question which that court

which contains all the facts, includes no such fact. The fact stipulated simply is that the shipments were made "to fill orders for rye whisky" given over the telephone. Of course, it was immaterial to Norris whether the whisky was shipped, or got to him in some other way. The Government's brief filed with the Circuit Court contained the statement (pp. 1, 11) that Norris requested and directed that the liquor be shipped to him by express. When we called the attention of the counsel of the Government to this error, it was frankly admitted as unintentionally made and the Circuit Court was requested, at the argument, by Government counsel, to disregard the statement and to strike it from their brief.

decided and, necessarily, it is the only question which is before this Court for review.*

If the Government is now attempting "to embrace a contention which had been expressly disclaimed and which could not be in the case consistently with the previous statement of counsel as to the one and sole point which they desired to raise," the short answer, that, under the rulings of this Court, it cannot now be done, is a sufficient one: *Great Northern Ry. Co.* v. *United States,* 208 U. S. 452, 470, 471. *Alice State Bank* v. *Houston Pasture Co.,* 247 U. S. 240, 242. *Webster Electric Co.* v. *Splitdorf Electrical Co.,* 264 U. S. 463, 464.

The Government also states (Brief, p. 20) that Norris, to effect the transportation of the liquor to him, accepted packages from the express company

* This case was at that time, at least, regarded as a test case by which the Government hoped to have this question of conspiracy to transport, by virtue of a purchase, definitively adjudicated. Unless the question here were so limited, the decision in this case would be valueless as a binding precedent of wide application, and the granting of the *certiorari* on the ground that the case "is one of great public interest and importance" (Petition, p. 10) would appear to have been under misapprehension of what the Government intended to urge here. Whether Norris must pay a $200. fine is of no moment. If all this Court is to decide is whether twelve purchases can make out a case of criminal liability (although a single one might not), the question of the effect of eleven, or ten, or nine, etc., will remain. The question would ultimately come down to one; and it is that question which is here involved. It is for the decision of such ultimate questions of prime importance that the exercise of the discretionary jurisdiction of this Court is reserved.

which had false labels and fictitious consignors; that he deceived the carrier by failing to disclose the true facts to it, knowing that if he did disclose them the transportation would not be undertaken; that he violated Sections 14 and 15 of the Prohibition Act by thus inducing the carrier to ship liquor without such disclosure, and by receiving such packages from the carrier. These allegations are both contrary to the stipulated facts and entirely outside of them.* Kerper, and not Norris, was the shipper. He alone effected the transportation. Such deception and inducing of the carrier as was done was Kerper's. There is nothing whatever to show that Norris personally received the shipments from the express company; consequently no criminal act or intent can be predicated upon such a gratuitous and unfounded assumption as the Government has made. The assertion that Norris violated Sections 14 and 15 is an entirely new one, has no foundation in fact, and has no bearing upon the question before this Court.† We will not consider it further.

The Government argues (Brief, pp. 21-22) that the opinion of the Circuit Court has the effect of giving the purchaser a special immunity. That is not true. The decision throws no kind of immunity around

* We wish to call the Court's attention to the footnote on p. 29.

† It is to be recalled that the second count of the indictment, which necessarily involved Norris' alleged acts in this connection, was waived.

the purchaser just because he is a purchaser. As the Circuit Court said in its opinion, "There would be no difficulty in conceiving a set of facts, which, if established, would sustain * * * an indictment [for conspiracy to transport], notwithstanding the conspiracy existed between the seller and the buyer" (R. 13). The decision simply is that merely being a purchaser does not carry with it the felony of being a party to a conspiracy to transport the liquor purchased when all that is done is that the *seller* delivers to the purchaser the liquor sold him. Of course, if a purchaser goes farther and does more, it is entirely possible that he may make himself a conspirator. There are many cases where a defendant has been properly convicted of conspiracy, even though he happened also to have been a purchaser. *Becher* v. *United States,* 5 F. (2d) 45, is a good example. We commented on that case at p. 16 ff above. It is a sufficient answer to this contention.

The Government says that if the decision in the case at bar is allowed to stand it will have a very detrimental effect upon prohibition enforcement. Quite the contrary. This decision works no change in enforcement. The Prohibition Act has been administered for ten years without there ever having been one single conviction of a purchaser such as Norris for conspiracy to transport. It is, therefore, difficult to see how this decision can have any detrimental effect upon that enforcement, when the decision allows that enforce-

ment to remain without change as it has always been. If the state of the law of criminal conspiracy, as shown by this case, is in such condition that it has detrimental effect on prohibition enforcement, then that same condition has existed as long as there has been prohibition to enforce. To contend now that to allow this decision to stand will have a detrimental effect on enforcement, and to ask for reversal, is to plead for a change which looks to the future. But the making of such changes is the province of the legislature. This is particularly true of the Federal criminal law, which is purely a matter of legislation.

For what he here did, Congress has not made Norris a felon. Knowingly, and, it is to be presumed, wisely, it has thus far pursued the fixed and manifest intention not to do so. If, after 10 years, there is to be a change, it is for Congress to make it.

We respectfully submit that the decision of the Circuit Court of Appeals should be affirmed.

FREDERIC L. BALLARD,
Attorney for Respondent.

CHARLES I. THOMPSON,
ALLEN HUNTER WHITE,
Of Counsel.

APRIL, 1930.